STATE OF MICHIGAN

COURT OF APPEALS

BRENDA STUMBO and LARRY DOE,

Plaintiffs-Appellees,

v

KAREN LOVEJOY ROE,

Defendant,

and

HEATHER JARRELL ROE,

Defendant-Appellant.

FOR PUBLICATION
June 5, 2020

No. 353695
Washtenaw Circuit Court
LC No. 20-000443-CZ

Before: BECKERING, P.J., and MARKEY and BOONSTRA, JJ.

MARKEY, J. (*dissenting*).

Because the affidavit of identity executed by defendant Heather Jarrell Roe (Roe) was facially defective and not in actual compliance with the election law, I conclude that the trial court did not err by precluding inclusion of Roe's name on the ballot for the position of Ypsilanti Township Clerk. Ignoring the facial defect in favor of extrinsic evidence that attempts to explain away the defect opens an election-law Pandora's box, creating a danger of abuse and inviting fraud. Accordingly, I respectfully dissent.

We review de novo questions of statutory interpretation. *Bazzi v Sentinel Ins Co*, 502 Mich 390, 398; 919 NW2d 20 (2018). In *Wayne Co v AFSCME Local 3317*, 325 Mich App 614, 633-634; 928 NW2d 709 (2018), this Court recited the well-established rules of statutory interpretation:

> The primary task in construing a statute is to discern and give effect to the Legislature's intent, and in doing so, we start with an examination of the language of the statute, which constitutes the most reliable evidence of legislative intent. When the language of a statutory provision is unambiguous, we must conclude that the Legislature intended the meaning that was clearly

> expressed, requiring enforcement of the statute as written, without any additional judicial construction. Only when an ambiguity in a statute exists may a court go beyond the statute's words to ascertain legislative intent. We must give effect to every word, phrase, and clause in a statute, avoiding a construction that would render any part of the statute nugatory or surplusage. [Citations omitted.]

Actual compliance with election laws is required—substantial compliance does not suffice. *Stand Up For Democracy v Secretary of State*, 492 Mich 588, 619; 822 NW2d 159 (2012). Under MCL 168.558, Roe was mandated to file an "affidavit of identity" if she wished to be on the ballot for township clerk. And an "affidavit of identity" that is defective on its face constitutes a ground to disqualify a candidate from inclusion on the ballot. *Berry v Garrett*, 316 Mich App 37, 44-45; 890 NW2d 882 (2016). The statute, MCL 168.558, requires the document to be in the form of an "affidavit." For a document to generally qualify as an "affidavit," it must, in part, be confirmed by the oath or affirmation of the party making it and be taken before a person having authority to administer such oath or affirmation. *Detroit Leasing Co v Detroit*, 269 Mich App 233, 236; 713 NW2d 269 (2005).[1] "In all matters where the notary public takes a verification upon oath or affirmation, or witnesses or attests to a signature, the notary public *shall require that the individual sign the record being verified, witnessed, or attested in the presence of the notary public*." MCL 55.285(5) (emphasis added). Even without the attestation requirements promulgated by the Secretary of State and reflected in the standard form, inherent in the production of any "affidavit" is the necessity that it be signed and dated by the affiant and the notary, and the Legislature itself demanded the filing of a document in the form of an "affidavit" under the plain and unambiguous language in MCL 168.558.

In this case, the notary public attested that the affidavit of identity was "subscribed and sworn" to him on April 21, 2020. Yet Roe indicated in the affidavit of identity that she executed the document on April 20, 2020. On examination of the face of the affidavit of identity, one would conclude that Roe signed the affidavit the day before it was signed by the notary public in contravention of the presence-requirement of MCL 55.285(5).[2] Minimally, the dates of affiant Roe's signature and the notary's attestation needed to match in order to make the affidavit of identity valid on its face. The dates were not the same; therefore, the affidavit of identity was defective on its face and was not in the form of a valid affidavit as required by MCL 168.558. In other words, there was no actual compliance with MCL 168.558.

Roe stated in a "declaration" that she signed the affidavit of identity on April 21, 2020, in a drive-through-lane at a bank, where she and the notary public "could see and speak with each other through the window and on a television monitor." Roe claimed that she mistakenly wrote down the wrong date. I first highly question whether such circumstances established that Roe executed the affidavit of identity "in the *presence* of the notary public." See MCL 55.285(5) (emphasis added). Regardless, I believe that we improperly start down a dangerous slippery slope

[1] The Michigan Election Law, MCL 168.1 *et seq*., does not define the term "affidavit."

[2] Even assuming that it is proper to consider extrinsic evidence, the email by the notary public did not expressly indicate that Roe signed the affidavit of identity in his presence.

when we look outside the four corners of an affidavit of identity that is defective on its face and consider extrinsic evidence to effectively correct the defect and resurrect the affidavit.

In sum, the affidavit of identity was defective on its face. Thus, the trial court did not err in ruling in favor of plaintiffs. In my view, the case is that simple. Accordingly, I respectfully dissent.[3] In view of the impact of this decision on Michigan election law during this election season, I would urge the Legislature or the Michigan Supreme Court to quickly address and provide clarity on the important issues raised in this appeal.

/s/ Jane E. Markey

[3] I do note that I also have some procedural concerns about this case relative to jurisdiction, ripeness, and standing.